

# market intelligence

Volume 2 • Issue 3

GETTING THE  
DEAL THROUGH 

# Cartels

Hans-Jörg Niemeyer leads  
the global interview panel  
covering 16 key economies

EU car parts –  
'The cartel of  
the century'?

North America • Asia-Pacific • Europe • Latin America  
Activity levels • Industry sectors • Key decisions • 2015 trends

Publisher: Gideon Robertson  
Senior business development manager:  
Adam Sargent  
adam.sargent@gettingthedealthrough.com

Product manager: Rachel Nurse  
Marketing assistant: Sophie Pallier  
subscriptions@gettingthedealthrough.com

Head of production: Adam Myers  
Editorial coordinator: Eve Ryle-Hodges  
Senior subeditor: Caroline Herbert  
Senior production editor: Amie Retallick  
Production assistant: Nathan Clark

Cover:  
fuchs-photography/iStock/Thinkstock

No photocopying. CLA and other agency  
licensing systems do not apply. For an  
authorised copy contact Adam Sargent,  
tel: +44 20 3780 4104

This publication is intended to provide  
general information on law and policy. The  
information and opinions which it contains  
are not intended to provide legal advice, and  
should not be treated as a substitute for specific  
advice concerning particular situations (where  
appropriate, from local advisers).

Published by  
Law Business Research Ltd

**Law**  
**Business**  
**Research**

87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3780 4104  
Fax: +44 20 7229 6910  
©2015 Law Business Research Ltd  
ISSN: 2056-9025



Strategic Research Sponsor of the  
ABA Section of International Law



Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112

GETTING THE  
DEAL THROUGH

# market intelligence

Welcome to *GTDT: Market Intelligence*.

This issue focuses on global cartel markets.

**Getting the Deal Through** invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

*Market Intelligence* is available in print and online at  
[www.gettingthedealthrough.com/intelligence](http://www.gettingthedealthrough.com/intelligence)

**Getting the Deal Through**  
London  
May 2015

## In this issue

Australia .....	2
Brazil .....	8
China .....	14
European Union.....	21
France.....	28
Germany.....	34
Hong Kong.....	40
India .....	46
Italy .....	51
Japan.....	57
Mexico.....	64
Romania.....	70
Spain .....	77
Turkey .....	84
United Kingdom.....	91
United States .....	97



Kentaro Hirayama, Kei Amemiya & Kazuyasu Yoneyama

# CARTELS IN JAPAN

Morrison & Foerster's Japan antitrust practice advises clients on a wide range of antitrust matters, including transactions and agency investigations. Their work includes cartel, monopolisation, unfair trade practices and administrative fine cases as well as merger reviews. In addition, the firm's antitrust lawyers in Tokyo provide counselling to clients on a wide variety of issues, such as pricing policies, intellectual property licensing, patent pools, distribution arrangements, trade associations, unfair trade and deceptive advertising issues, and antitrust compliance programmes.

The Japan antitrust practice is led by partner Kei Amemiya, one of the few private practitioners who has served as an investigator at the Japan Fair Trade Commission (JFTC), the competition authority in Japan. This experience, along with knowledge of Japanese and international business cultures, enables the firm to provide top-quality strategic solutions for clients on Japanese competition law and regulatory issues. The firm works with clients in numerous industry sectors, including, automotive, chemical, technology, pharmaceutical, transportation, and consumer products. Of counsel Kazuyasu Yoneyama and of counsel Kentaro Hirayama also contributed to this article.



Kei Amemiya

**GTDT:** *What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?*

**Kei Amemiya, Kazuyasu Yoneyama & Kentaro Hirayama:** The Japan Fair Trade Commission (JFTC) has been actively investigating both domestic and international cartel cases. Internationally, the JFTC has completed several auto parts investigations as well as an investigation into the maritime freight industry. Heavy fines were levied in all of those cases.

Domestically, the JFTC has investigated or is investigating the conduct of several trade associations. The JFTC has been also active in investigating traditional bid riggings. Recent JFTC investigations of trade associations were mainly in the agriculture industries. This is symbolic in demonstrating that the JFTC is expanding the scope of targets to regulated industries. The agricultural industry and maritime freight industry also number among examples of this.

Regardless, the JFTC has shown no hesitation in referring cases with great impact on the national economy to the Public Prosecutors Office for criminal indictment. A clear example of this is the referral of the *bearing* cartel and the bid rigging on snow melting equipment for the Shinkansen bullet train construction by the JFTC.

**GTDT:** *What do recent investigations in your jurisdiction teach us?*

**KA, KY & KH:** Particularly from the *auto parts* investigation, the JFTC has obviously gained a deeper understanding of the automotive industry and the experience to smoothly handle cross-cultural issues with companies and agencies in other jurisdictions.

In the private sector, companies and their counsel have also gained valuable experience in internal investigations regarding potential violations that span multiple jurisdictions. A unique facet of the *auto parts* investigation is that the scope of the investigation continues to expand as companies internally investigating one product often find questionable information on another product.

From our perspective, however, companies may be taking too conservative a stance towards the gravity of these investigations, and may be confessing to violations based on unclear facts. This cannot be said to be entirely the company's fault, because the media has frequently reported large fines and severe sentencings for imprisonment. Even before the *auto parts* investigation, leniency – essentially, self-reporting by a cartel member – has triggered a majority of the investigations. On the other hand, the JFTC may be overly following, or even having a more expansive view than, the

views of these leniency applications and slightly lacking in unbiased analysis. One example is the *Air Water* case. This is neither an *auto parts* case nor a case vacated by court on the merit. Rather, it was a company that was targeted without applying for leniency, that challenged such targeting, and that was also successful in court. The court did not follow the JFTC's view which was consistent with other leniency applicants.

***GTDT: How is the leniency system developing? What factors do you advise clients to consider before applying for leniency?***

**KA, KY & KH:** Since the introduction of the leniency programme in 2006, it has steadily become more and more entrenched in the Japanese antitrust investigation system. From 2006 to 2009, the JFTC received around 80 leniency applications per year. However, from 2010 to 2012, the number of application spiked to more than 100 per year, due to the rush of fillings for auto parts infringements. That contrasts sharply with 2013, when a significant drop in applications was visible with only around 50 applications that year. This may be no more than a temporary drop, or it may be signalling the completion of the first round of cleaning up of major potential cartels. It is difficult to predict at this moment whether applications will begin increasing again or the number will remain steady at the 2013 level.

Within the current leniency programme, attraction to the second or later-in-line applicants is a major aspect that could be improved. Namely, the current system is not fully successful in inviting second-place applicants before the initiation of investigation. To make this happen, a system like the 'Amnesty Plus' system currently in place in the US could be an option for Japan. In this regard, plea bargaining is likely to be introduced, although in a limited manner, in the Criminal Law. This may affect discussions regarding potential reform of the Antimonopoly Act.

In our discussions with clients, a thorough analysis of the pros and cons of applying for leniency is critical before taking any concrete steps. Filing a leniency application is not always the only or best method of resolution for clients who have discovered questionable information. This is particularly true if there is potential for multi-jurisdictional investigation. Our experience on a number of cross-border cartel investigations has indicated that full cooperation with the authorities subsequent to a leniency application does not necessarily mitigate the overall monetary exposure of the company. For instance, it may encourage authorities to expand the scope of the charge and the amount of the fine may go up accordingly. The amount of the fine may subsequently increase to greater than the amount that the company successfully reduced as a result of the leniency

application. The JFTC is drawing criticism from the private bar that its investigators are not fully respectful of due process. In fact, the Cabinet Office has recently published a report that explicitly references this concern. This claim is primarily based upon the criticism that JFTC investigators develop a case based on their own views, rather than carefully listening to the explanations of company employees and involved parties. Companies need to analyse the potential negative impacts of self-admission regarding infringements on investigation in other jurisdictions, defence and settlement discussions on private damage suits.

***GTDT: How does the antitrust authority interact with other authorities at home and abroad?***

**KA, KY & KH:** The JFTC has criminal investigation power. However, only the public prosecutor can indict the offenders. Therefore the JFTC must refer a case to the Public Prosecutors Office if the JFTC would like to seek criminal charges, and thus they are in regular contact with Public Prosecutors Office. In a criminal investigation, the JFTC fully coordinates with the Public Prosecutors Office.

For cross-border cartels, multi-jurisdictional cooperation with antitrust authorities abroad is conducted proactively under bilateral agreements. As of March 2015, the Japanese government has formal cooperation agreements on antimonopoly conduct with each of the US and the Canadian governments as well as the EU. The Japanese government also has a variety of economic partnership agreements with various foreign governments. Further, the JFTC also has cooperation agreements or memorandums with agencies in Brazil, Korea, the Philippines and Vietnam. Thus, it should be noted that, based on those agreements, the JFTC has regular discussions with major antitrust authorities around the globe and frequently coordinates with foreign agencies on the timing of raids, search, and on-site inspections. Additionally, the JFTC often requests

***“Within the current leniency programme, attraction to the second or later-in-line applicants is a major aspect that could be improved.”***



Kazuyasu Yoneyama



Kentaro Hirayama

leniency applicants to waive confidentiality for the information and documents they provide so that the JFTC may share the documents with the foreign agencies. This practice enhances the ability of the JFTC to closely collaborate with overseas agencies in investigations. A clear example of this is the *car shipping* cartel, in which the US DOJ and the JFTC opened official investigations simultaneously. Both authorities agreed to split the relevant shipping trade lanes that each of them will prosecute based on intensive consultation with each other.

**GTD:** *Tell us about the authority's most important decisions over the year. What made them so significant?*

**KA, KY & KH:** Among international cartel cases, the *maritime car shipping* cartel would likely be the most remarkable case from 2014. As previously discussed, it is a good example of the JFTC acting in close coordination with the US DOJ. This particular case is also significant because it is a non-auto parts, international investigation. Prior to this, many practitioners in the international field have been focused on auto parts. Thus, we could say this was innovative as a deviation from the recent norm.

As for domestic cartel cases, there were several important cases last year. A *corrugated board* case drew administrative fines of ¥13 billion in aggregate, although the targeted companies ranged from large corporations to small companies. The JFTC reportedly commenced the investigation without a leniency application, which is significant due to the rarity of such action lately. This case is also significant in that regard. The bid rigging on snow melting equipment for the Shinkansen bullet train construction, previously mentioned, was also significant for four reasons. First, this was a 'government-led' bid rigging in which the government agency that conducted the bids organised the bid rigging. Second, notwithstanding the government-led bid rigging, the JFTC referred the case to the Public Prosecutors Office for criminal indictment in which both the companies and individuals involved were convicted. Third, the 'Hokuriku Shinkansen' bullet train – for the tracks for which snow melting equipment was purchased based on bid rigging, just started commercial operation on 14 March 2015. This reminded us of the JFTC investigation. Finally, a couple of cartel participants recently filed a lawsuit against the Railroad Construction, Transport and Technology Agency to claim for a refund of the penalty they

paid to the Agency under their contracts with the Agency due to their involvement in bid rigging. However, the cartel participants are reportedly arguing that there should be no monetary obligations on their part as the big rigging was organised by the Agency. It will be interesting to see how this cartel case develops.

**GTDT:** *Were there any notable challenges to the authority's decisions in the courts over the past year? Does the authority both investigate infringements and issue decisions or must it coordinate with/apply to another body before a first-instance decision can be made? How do you feel about the level of judicial review in your jurisdiction?*

**KA, KY & KH:** As a matter of background, the JFTC can issue an administrative order independently. For cartels, the JFTC can issue a cease-and-desist order as well as an order to pay a fine without consulting with other government agencies. Under the current system, JFTC orders are reviewed by the JFTC itself in an administrative hearing called *shimpan*. Following a *shimpan* hearing, the parties could then bring the JFTC's decision to the Tokyo High Court for judicial review.

It has been extremely rare, if at all, for the JFTC to reverse after the *shimpan* hearing the order that the JFTC itself previously issued. While in the past the court had been reluctant to object to JFTC orders, the court has now begun to occasionally rule in opposition to JFTC decisions. A notable example over the past year was the *Air Water* case. The Tokyo High Court did not accept the JFTC's finding on the nature of Air Water's business, which was critical in the calculation of the fine. As a result, the Court reduced the fine by 80 per cent.

The new rules will have already come into effect when this interview is published. Under the new rules effective as of 1 April 2015, the *shimpan* hearing will no longer exist, and the recipient of a JFTC order can file a suit with the Tokyo District Court directly. Therefore, there will no longer be the somewhat strange process in which the JFTC reviews whether the JFTC's order was correct. At the same time, the so-called substantial evidence rule will have been removed from the Antimonopoly Act. The court will be no longer bound by the JFTC's findings, even if there is substantial evidence to support the JFTC's finding.

**GTDT:** *Is private cartel enforcement on the increase in your jurisdiction? Do you think of your jurisdiction as being 'claimant friendly'?*

**KA, KY & KH:** Traditionally, private actions have not occurred frequently in Japan. This is both due to the fact that Japan does not have a class action system and that Japan does not have a strong discovery system. It is our personal impression that the number of cases has increased over the past couple of years, but the absolute number remains small.

It is likely that a variety of damages claims relating to cartels remain out of court in Japan. However, we believe that most of those cases are damages claims related to bid riggings. Government contracts for items such as construction and procurement of goods typically have penalty clauses in case the bidders rig bids. With that provision, the government agencies only have the burden to prove that the participants rigged bids – proof of damages is not required, which is useful for these agencies. Typically a JFTC finding precedes such penalty claims from government agencies, and the companies that rigged bids do not frequently challenge these penalty claims because the facts of the situation are laid clear. Thus, it is reasonable to believe that most of the claims of this kind do not go to court.

However, this traditional trend may change. It is our recent observation that companies that have allegedly suffered damages as a result of a cartel organised by their trade partners – typically their vendors – have little hesitation in claiming against their partners. So far, this type of damages claim is typically conducted in order to seek overall settlement of the international cartel on a worldwide basis. Indeed it appears that car makers, including Japanese companies, are approaching their suppliers to seek damages with regard to auto parts cartels. In the case of global settlements, however, it may be unclear what portion of the

***“Under the new rules effective as of 1 April 2015, the *shimpan* hearing will no longer exist, and the recipient of a JFTC order can file a suit with the Tokyo District Court directly.”***

## THE INSIDE TRACK

*What was the most interesting case you worked on recently?*

**KA:** We are involved in a variety of cartel cases, both international and domestic, both representing companies and individuals. Each is interesting in their own regard. However, we cannot identify specific cases due to confidentiality. Nonetheless, it is enormously rewarding to successfully defend our clients in minimising their exposure, and to see our clients pleased at the results.

*What's the first thing you would do if you were in charge of the competition authority?*

**KH:** I would like to work on reform and improvement of investigative measures and proceedings. This would include (i) an introduction of a procedure for settlement and plea agreement to effectively conduct and complete investigations, thereby avoid waste of time and resources, as well as (ii) an improvement of skills for forensic investigations to effectively detect and locate relevant evidence even in the absence of leniency applications or cooperation from target companies.

*What advice would you give to a client when a cartel investigation is imminent?*

**KY:** Develop the facts on a 'rush' basis to decide whether to file leniency or defend.

Filing leniency is not necessarily a requisite solution under such situation.

Cooperation with the antitrust agencies under the leniency notice may result in larger fines and a weaker bargaining position in private damage suits.

Full defence may provide a good chance of success in lowering fines or being discharged.

Developing the facts is important as an examination of overall pros and cons of filing leniency is highly dependent upon the facts of the situation.

**Kei Amemiya, Kazuyasu Yoneyama  
& Kentaro Hirayama  
Morrison & Foerster / Ito & Mitomi  
Tokyo  
[www.mofo.com](http://www.mofo.com)**

overall settlement is allocated to each jurisdiction. While some might point out that there are few precedents in Japan for damages or that the legal system is not 'claimant-friendly', we do not find that a convincing argument to claim that no damages relating to Japan should be included or pursued.

In fact, shareholders have not been quiet lately about their view that a failure to claim damages may be considered negligence – or breach of fiduciary duty – on the part of the company management. The management cannot disregard the potential damages, even if they are not easily enforceable in the practical sense. The government agencies are no exception to this either. The taxpayers may raise their voices against the government agencies if they do not take any actions. In a case involving waste incinerator bid rigging, a number of local government agencies actually filed lawsuits against companies and were awarded large amounts of damages.

In a few cases, shareholders have sued the company management, simply because the company committed cartel activity. However, shareholders may go further. Shareholders of a large Japanese company filed a 'shareholder derivative suit' against the management when

the company failed to be the first in line in the leniency application. The shareholders leverage the argument that if the management seriously conducted an internal investigation when the questionable information first arose, then the company could have self-reported the violation to the JFTC earlier. However, failure to do so means a lost opportunity to secure the first-in-line position, with a much better chance of a reduction in the fine.

Stakeholders' views are becoming more critical and they are less hesitant to take action, whether it is a damages claim or a derivative suit. Private actions are frequently part of the discussion about reforming the competition law system. Abolishment of the *shimpan* hearing is one of the examples of such changes. Even though its pace may be slow and gradual, it is likely that the government will change the legal system to be more claimant-friendly in reaction to the demands from stakeholders.

*GTDT: What developments do you see in antitrust compliance? What major features do you think a state-of-the-art compliance system should have?*

**KA, KY & KH:** The recent storm of worldwide antitrust investigations related to auto parts triggered many Japanese companies to enhance antitrust compliance by enacting or revising compliance policies and competition-law focused codes of conduct. In particular, companies targeted in past cartel investigations are vigorously making efforts to reinforce compliance training.

Fortunately, we have numerous opportunities to be involved in developing, improving and enforcing compliance programmes of both Japanese companies as well as the subsidiaries of foreign companies here in Japan. We are frequently invited to conduct in-house seminars, workshops, role plays and mock searches.

One such example that we have frequently seen in such experiences is that companies are developing a system to actually implement a compliance policy concerning meeting with competitors. Companies have often had a compliance policy consisting of one sentence such as, 'you should not meet with a competitor without legitimate reason', but often no more than that. It is almost impossible for employees to properly judge the legitimacy, and companies are also at risk if they do not know who is meeting with whom for what purpose. Companies are therefore trying to establish a systematic approval mechanism on proposed meetings with competitors.

Traditionally, Japanese companies have been tolerant about meetings with competitors. Indeed, some companies, even large listed companies, have no clear policy about meeting with competitors and they provide no education to employees about the risks associated with a competitor meeting. This is far behind the global standard. It is a reality, though. For such a client, if we are asked to assist, we will advise that it develop a long-term plan to establish a sophisticated compliance policy, relevant mechanism for enforcement, and employee education.

Companies that already have sophisticated compliance policies seem to focus more on strengthening education or audit, rather than drafting rules. Generally, subsidiaries of US or European companies tend to have such sophisticated global compliance policy. Some companies even have an 'in-house leniency programme' to further advocate internal whistleblowing and competition-law focused audits by external antitrust experts. To achieve the goal of those advanced policies, understanding on the part of employees is essential. Companies are becoming particularly proactive in employee education in this regard.

**“Some Japanese companies have no clear policy about meeting with competitors. This is far behind the global standard.”**

**GTDT:** *What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?*

**KA, KY & KH:** The biggest change will be abolishment of the *shimpan* hearing as we previously discussed. The new rules come into effect on 1 April. The JFTC will no longer review its own orders in a *shimpan* hearing, but the parties will go to a court directly to challenge JFTC orders.

In the same amendments to the Antimonopoly Act, pre-order discussions with the investigators will be slightly more defendant-friendly. Under the current system, the JFTC investigator explains its findings and shows evidence to prove the violation to the defendant once the draft order (similar to Statement of Objections in the EU) is delivered. However, no copies are provided and time allocated to each defendant is highly limited. Under the new rules, copies of evidence will be available to the defendant as long as that evidence came from the defendant. Copies of the statement of the defendant's employees are also available. As for evidence from other companies, the defendant can only review it in a designated room in a JFTC building for a limited period of time, but still has no right to take copies.

In addition, the JFTC is discussing a potential reform to its investigation procedures. For example, it is reported that counsel will have a right to attend on-site inspections conducted by JFTC investigators. However, this has not been firmly decided and the timing for its implementation is unknown.

*Also available online*



[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



*Official Partner of the Latin American  
Corporate Counsel Association*



*Strategic Research Sponsor of the  
ABA Section of International Law*